IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

MICHAEL H. COOK, Plaintiff, vs. The CITY OF ELKADER, IOWA; BRAD CARNES; STEVE MCCORKINDALE; BETTY LANDIS; and THOMAS DIERS, Defendants.	No. C03-1029 **ORDER**

This matter comes before the court pursuant to defendants' January 21, 2005 motion for summary judgment on Count 2 (whistleblower) of plaintiff's second amended complaint (docket number 62). Plaintiff has resisted defendant's motion and requested that the court reconsider its January 21, 2005 order granting summary judgment on plaintiff's First Amendment and public policy wrongful discharge claims. The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). Plaintiff's motion for reconsideration is denied. For reasons set forth below, defendants' motion for summary judgment as to plaintiff's whistleblower claim is granted.

The plaintiff, Michael H. Cook, claims that his termination as the public works director for the City of Elkader violated the Iowa "whistleblower" statute, Iowa Code § 70A.29. Specifically, the plaintiff claims that he was terminated, in determinative part, for expressing his concerns that the city was violating Iowa law in allowing Chuck Hansel to sit on the council while a *de facto* city employee, and in using road use funds to pay half of the salary of Kim Werger, when Werger was not allocating half of his labor to the

streets department. The defendants argue that the undisputed facts demonstrate that they are entitled to summary judgment on plaintiff's "whistleblower" claim.

SUMMARY JUDGMENT

The applicable legal standard was set forth in the court's prior order.

STATEMENT OF MATERIAL FACTS

The court hereby incorporates its statement of material facts as set forth in its January 21, 2005 order granting summary judgment on defendants' motion for summary judgment as to counts 1, 3, 4, and 5 of plaintiff's second amended complaint. By way of affidavit, the plaintiff alleges the following additional facts.

Plaintiff first discussed the Werger salary/labor allocation issue with city clerk Ryan Heiar in September 2001. Heiar responded that the council had made its decision and that it was not open for discussion. Heiar also told the plaintiff that the council wanted to take the pressure off of Chuck Hansel, it was an in-house deal, and that he [presumably Heiar] did not want the plaintiff talking around about it. Heiar told the plaintiff that whether the plaintiff liked it or not, that is what the council wants to do.

In December 2001 Heiar left his job as the Elkader city clerk. Before his replacement started, the plaintiff told the mayor, defendant Diers, that Werger was performing no work for the streets department, even though half of his salary was being paid with road use money. The mayor told the plaintiff to wait and that the new city clerk would address the issue. The mayor also said "Right now, no one wants to mess with Chuck."

In the fall of 2001 and the first part of January 2002, the plaintiff had discussions with Chuck Hansel regarding the Werger salary/labor allocation issue. According to the plaintiff, Hansel became progressively more angry as the conversations went on, telling the plaintiff to "butt out," "leave it alone," "keep your mouth shut," and "stick to your

job."[1] In November, following one of his conversations with Hansel, the plaintiff was counseled by Heiar to stick to his own job and quit mentioning the road use funds issue. Heiar also told the plaintiff that defendant McCorkindale had prompted the counseling.

In January 2002, plaintiff expressed his concerns to defendant Carnes. In that same month, Greg Crocker became the Elkader city clerk. When the plaintiff expressed his concerns to Crocker, Crocker replied "That's not right, we've got to get that fixed." During this conversation Crocker also agreed with the plaintiff's suggestion that Werger needed a job description and should be reporting to a city supervisor, and not exclusively to Chuck Hansel. Crocker and the plaintiff discussed several points and Crocker began drafting a job description. Later that same day Crocker called the plaintiff to report that he had received a telephone call from defendant McCorkindale. Crocker told the plaintiff "These guys feel like you're picking on Chuck. You need to back off."

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[1]The plaintiff testified as follows in his August 24, 2004 deposition:

> Q: Did you ever express that concern [using road use funds to pay Werger's salary] to Chuck Hansel?
> A: I doubt it. I don't believe I ever talked to Chuck about that.

See Defendant's Appendix at 43-44.

> Q: Did you ever have any conversations with Mr. Hansel about Werger?
> A: Initially, you know, how we were going to work this out. And I just kind of told him don't worry about it.
> Q: Pardon me?
> A: Initially, when this whole thing started, then we had a little meeting with Chuck to talk about it, and he just told me not to worry about it.

See Defendant's Appendix, p. 52.

CONCLUSIONS OF LAW

Iowa Code § 70A.29

Iowa Code § 70A.29 provides, in pertinent part:

> 1. A person shall not discharge an employee from or take or fail to take action regarding an employee's appointment or proposed appointment to, promotion or proposed promotion to, or any advantage in, a position in employment by a political subdivision of this state as a reprisal for a disclosure of any information that employee to a member or employee of the general assembly, or an official of that political subdivision or a state official or for a disclosure of information to any other public official or law enforcement agency if the employee reasonably believes the information evidences a violation of law or rule, mismanagement, a gross abuse of funds, an abuse of authority, or a substantial and specific danger to public health or safety. This section does not apply if the disclosure is prohibited by statute.
>
> 3. Subsection 1 may be enforced through a civil action.
>
> a. A person who violates subsection 1 is liable to an aggrieved employee for affirmative relief including reinstatement, with or without back pay, or any other equitable relief the court deems appropriate, including attorney fees and costs.

The plaintiff alleges that his discharge from the city violated § 70A.29 in that it was based, in determinative part, on his expressions of concerns to city officials regarding the

Hansel conflict of interest and the Werger salary/labor allocation issues.[2] Defendants argue that summary judgment should enter on this claim.

Analytical Framework

The parties agree that plaintiff's whistleblower claim should be analyzed under the McDonnell Douglas burden-shifting framework. Under this framework, the plaintiff must first establish a prima facie case that his termination was the result of his actions protected under the whistleblower statute. Upon so establishing, the burden then shifts to the defendants to articulate a non-retaliatory reason for plaintiff's termination. The burden then shifts back to the plaintiffs to show that the employer's legitimate reason was merely a pretext for retaliation. Chadwell v. Koch Refining Co., L.P., 251 F.3d 727, 733 (8th Cir. 2001). A prima facie case of retaliatory discharge consists of: (1) protected conduct

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[2]Iowa Code 362.5 provides:

> When used in this section, *"contract"* means any claim, account, or demand against or agreement with a city, express or implied.
>
> A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:
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> 7. A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed.

Iowa Code § 312.6 provides:

> Funds received by municipal corporations from the road use tax fund shall be used for any purpose relating to the construction, maintenance, and supervision of the public streets.

by the employee; (2) an adverse employment action by the employer; and (3) a causal connection between the two. Kunferman v. Ford Motor Co., 112 F.3d 962, 965 (8th Cir. 1997); Griffith v. City of Des Moines, 387 F.3d 733, 738 (8th Cir. 2004).

Protected Conduct

Defendants argue that the plaintiff's complaints regarding the Werger salary/labor allocation issue and the Hansel conflict of interest issue are not protected activities under Iowa Code § 70A.29(1) because the plaintiff did nothing more than inquire and complain to the city administrator, the mayor and several council members about matters of which they were already aware, without taking either matter to any public official or entity outside the city of Elkader. The defendants further argue that the plaintiff's belief regarding the Hansel conflict of interest issue was not reasonable. Finally, the defendants contend that city administrators Heiar and Crocker are not public officials, so plaintiff's complaints to them are not protected under § 70A.29. Plaintiff counters that: (1) whether his interpretation of the conflict of interest issue was legally correct is irrelevant; and (2) Mr. Heiar and defendant Carnes are public officials for purposes of the whistleblower statute.

In response to the defendants' first argument, the court does not read Iowa Code§ 70A.29 to require that the complaint be made to an "outside" public official or entity. As such, the court finds that this case is not analogous to Donahue v. Schwegman, Lundberg, Woessner & Kluth, P.A., 586 N.W.2d 811 (Minn. Ct. App. 1998). In Donahue, the Minnesota Court of Appeals upheld the trial court's summary dismissal of the plaintiff's whistleblower claim, ultimately finding that the plaintiff's alleged "whistleblowing" was not a "report" under the whistleblower statute, but rather was

merely a complaint to the partners of a suspected violation involving an acknowledged law firm practice. Id. at 813-14.[3] Likewise, this court does not interpret Iowa Code § 70A.29, in light of its plain language, so narrowly as to apply only to public employees who report violations of law to law enforcement officials. Contra Smuck v. Nat'l Mgmt. Corp., 540 N.W.2d 669, 672 (Iowa Ct. App. 1995) ("Iowa Code section 70A.20 applies only to public employees who report violations of law to law enforcement officials.")[4].

Based on the record before the court, the issues plaintiff complained of had not been previously raised or "acknowledged" by the city. While the city was undeniably aware that Werger was being paid out of road use funds and that Hansel was an employee of PeopleService, Inc., which had a contractual relationship with the city, there has not been evidence presented demonstrating that the legality/potential illegality of these issues had been raised with or acknowledged by the city prior to the plaintiff doing so. Moreover, while the court agrees with the defendants that Heiar and Crocker, as city administrators, would not constitute "public officials" under the five-factor test set forth in Hegeman v. Kelch, 666 N.W.2d 531 (Iowa 2003), the defendants do not dispute that defendants Diers, Carnes, and McCorkindale, as the mayor and council members, respectively, constitute

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[3]The court's finding in Donahue that summary dismissal of plaintiff was proper because plaintiff's "report" concerning an internal payroll deduction practice failed to implicate public policy was abrogated the Supreme Court of Minnesota in Anderson-Johnningmeier v. Mid-Minnesota Women's Ctr., 637 N.W.2d 270 (Minn. 2002) ("In sum, we reject the importation of a public policy requirement into the whistleblower statute and hold that the protection of [the Minnesota whistleblower statute] are not limited to reports that implicate public policy).

[4]See Iowa Code § 70A.29(1) (providing that a "person shall not discharge an employee . . . as a reprisal for a disclosure of any information by that employee to a member or employee of the general assembly, or an official of that political subdivision or a state official or for a disclosure of information to any other public official or law enforcement agency . . .")

"public officials."[5] It is further undisputed that the plaintiff raised the Werger salary/labor allocation issue and/or the Hansel conflict of interest issue with defendants Diers, Carnes, and McCorkindale, who were elected municipal/public officials.

The court cannot say, as a matter of law, that the plaintiff's belief regarding the Hansel conflict of interest issue was unreasonable. For summary judgment purposes, the court finds that the plaintiff has engaged in conduct protected by Iowa Code § 70A.29[6].

Adverse Employment Action

As set forth in its previous order, the court finds that the plaintiff did suffer an adverse employment action.

Causal Connection

Defendants argue that the plaintiff cannot establish sufficient evidence of a causal connection to survive summary judgment. Plaintiff's complaints regarding the Werger salary/labor allocation and Hansel conflict of interest issues were raised in late 2001 and very early 2002. The plaintiff was not terminated until June of 2002, and all of the communication and correspondence leading to plaintiff's termination focuses solely on the plaintiff's request that Hansel sign the safety assurances memo, Hansel's refusal to do so,

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[5]The five factors are: (1) the position must be created by the constitution or legislature or though authority conferred by the legislature; (2) a portion of the sovereign power of the government must be delegated to the position; (3) the duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law; and (5) the position must have some permanency and continuity, and not be only temporary and occasional. Hegeman, 666 N.W.2d at 534 (citing Hutton v. State, 16 N.W.2d 18 (1944)).

[6]Contrary to the plaintiff's characterization, the court's prior order did not conclude that plaintiff's expressions were not protected because Hansel agreed not to vote on PeopleService issues. Instead, this fact was discussed in the court's causation analysis, i.e., that the Hansel conflict of interest issue had been addressed by the council and remedial measures agreed upon undercut the plaintiff's argument that he was fired, in determinative part, for raising the issue.

the city's efforts to otherwise appease the plaintiff so he would return to work, and the plaintiff's rejection of these efforts.

The plaintiff argues that summary judgment is improper as he has now proffered evidence demonstrating Hansel's awareness of plaintiff's protesting the Werger salary/labor allocation issue. The plaintiff further argues that Hansel, as an agent of the city, had the ability to return the plaintiff to work simply by signing the safety assurances memo. According to the plaintiff, the city council acted as a "cat's paw" for Hansel's animosity toward the plaintiff, and a jury could conclude, after hearing the evidence of how the council turned on Mr. Cook at the January 31, 2002 meeting, that Hansel had cut a deal with his fellow council members to force the plaintiff out of a job.

In reply, defendants contend that the plaintiff cannot create a fact question by submitting an affidavit contradicting his prior sworn testimony, pointing to paragraphs five (5) through eight (8) of plaintiff's unnotarized affidavit, submitted with his summary judgment resistance, which directly contradicts his prior deposition wherein the plaintiff testified that he doubted whether he expressed his concern [regarding the Werger salary/labor allocation issue] to Chuck Hansel, i.e., "I don't believe I ever talked to Chuck about that." See Defendants' Appendix, pp. 43-44. Defendants further argue that the plaintiff's "cat's paw" argument is based solely on speculation. According to the defendant, it is hardly likely that the city had become Hansel's "cat's paw" given the city's attempts to persuade the plaintiff to return to his job.

Defendants' motion is granted. Even accepting as true plaintiff's most recent version of events wherein he did discuss the Werger salary/labor allocation issue directly with Hansel, there is still no evidence that Hansel was aware that the plaintiff had raised this issue with the mayor or others on the council. That is, there is no evidence that Hansel was aware that the plaintiff had "blown the whistle" with respect to the Werger salary/labor allocation issue. Likewise, there is no evidence, direct OR circumstantial, from which a reasonable jury could infer that Hansel's purported anger with the plaintiff

regarding his "whistle-blowing" infected the entire city council, who voted unanimously to terminate the plaintiff's employment. The court has not and is not applying a higher standard for proving causation because of a municipality. The mayor did not testify that several council members actually agreed with him that the plaintiff had worn out his welcome by taking too much time off, or that they had made statements to that effect. Instead, he testified as follows:

> Q: Did you want Mike Cook to go back to work in June of 2003?
> A: No.
> Q: Why not?
> A: I just thought he'd outworn his welcome.
> Q: Why?
> A: Because of all of the -- taking all that time off, and he had time to come back, and the rest of the crew would have been just as happy if he didn't come back from what I picked up anyway. And the rest of the council, I think, thought the same way, that he'd just outworn his welcome.

See Plaintiff's Appendix, p. 32.

Fed. R. Evid. 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." What the mayor, who had no vote in the plaintiff's termination, thought the rest of the council was thinking, fails to satisfy Rule 602. Further, the mayor's testimony does not fall under Fed. R. Evid. 801(d)(2) as an admission by a party-opponent because it set forth no statements made by the council members. Thus, the plaintiff's analogy of the mayor to the CEO of a private company who states that the executive team wants an employee terminated is flawed.

Likewise, there is simply no evidence to support the plaintiff's theory that Hansel cut a deal with the rest of the city council to oust the plaintiff from his job. While city administrator Crocker had assured the plaintiff prior to the meeting that the council would back him up on the Hansel issue, as the meeting unfolded the streets workers did not

support the plaintiff. There is no evidence that any deal was made or that Hansel influenced the council to vote to terminate the plaintiff. While Hansel could have signed the assurances memo, there is no evidence that his refusal to do so was a result of the plaintiff's protected activities. Moreover, the court agrees with the defendants that the city's efforts, spanning four months or more, to otherwise assure the plaintiff of his physical safety and get him to return to work undermine the plaintiff's argument that the council was working as Hansel's "cat's paw."

The plaintiff's employment was terminated after he refused the city's assurances of his personal safety, and after he had exhausted all of his FMLA leave and then some. As the plaintiff cannot establish a prima facie case that he was discharged in violation of Iowa Code § 70A.29, summary judgment is proper.

Defendants' Legitimate Non-Retaliatory Reason & Pretext

For the same reasons as set forth above, the court finds that the undisputed facts fail to support a finding that the defendants' proffered reason for the plaintiff's termination is pretext.

Upon the foregoing,

IT IS ORDERED that defendants' motion for summary judgment on Count 2 (whistleblower) of plaintiff's second amended complaint (docket number 62) is granted. Judgment shall enter in defendants' favor and this case be dismissed with prejudice.

February 11, 2005.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT